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No. 83-477

IN THE

Supreme Court of the United States

October Term, 1983

EARLE M. JORGENSEN COMPANY, et al.,
Petitioners,

v.

THE CITY OF SEATTLE, WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Washington Supreme Court correctly concluded that the generic right to intervene and participate, provided by Section 121(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2361(a), does not require a nonregulated electric utility to adopt judicial procedures whenever it considers or establishes electric rates?

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OPINION BELOW

The opinion of the Washington Supreme Court in *Earle M. Jorgensen Co. v. Seattle* is reported at 99 Wn.2d 861, 668 P.2d 1328 (1982), and is reprinted in Petitioners' Appendix pages 6a-23a.

STATEMENT OF THE CASE

A concise statement of the case is set forth in the Washington Supreme Court's opinion below, 99 Wn.2d at 863-5 and 873. (Pet. App. pp. 8a-10a and p. 18a.)

SUMMARY OF ARGUMENT

The Washington Supreme Court correctly interpreted the requirements of PURPA. Section 121(a) of PURPA (16

U.S.C. § 2631(a)) provides a generic right of any electric consumer to intervene and participate in any ratemaking proceeding. It does not prescribe any specific procedures that must be adopted by either a State regulatory authority or a nonregulated electric utility, much less the full panoply of judicial safeguards, equivalent to an evidentiary hearing, urged by petitioners.

When it enacted PURPA, Congress did not preempt the field of electric rate regulation. Congress allowed states to continue their substantive regulation in the area on the condition they consider the suggested federal standards. *FERC v. Mississippi*, 456 U.S. 742, 765 (1982). Apart from the specific procedural requirements for considering the suggested federal standards set out in Sections 111, 113 and 114 of PURPA, Congress did not establish any particular procedures that must be adopted to provide the generic "right to intervene and participate" contained in Section 121(a). Indeed, the Conference Committee report discussing the intervention and participation rights provided in Section 121 stated explicitly that "The procedures for the type of intervention are left to State law." H.R. Rep. 95-1750, 2d Sess. 82, *reprinted in* U.S. Code Cong. & Ad. News 7797, 7816.

Contrary to petitioners' contention, the court below did not "eliminate" petitioners' participation in Seattle's ratemaking process. The Washington Supreme Court specifically held that the rights of intervention and participation provided in Section 121(a) of PURPA exists in *any* proceeding. (Pet. App. p. 17a.) The Washington Supreme Court, however, upheld the legislative, rather than judicial, *mode* of participation that Seattle provided.

As a consequence, there is no basis for the Court to grant petitioners' request for review. This Court has consistently maintained the principle expressed in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978) that "Even apart from the Administrative Procedure Act, this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments."

ARGUMENT

1. The Decision Below is Consistent With Decisions of This Court

The ruling below is consistent with this Court's recent decision upholding the constitutional validity of PURPA. *FERC v. Mississippi, supra.* Referring to the procedural requirements in Titles I and III of PURPA that require state commissions (and nonregulated electric utilities) to follow certain notice and comment procedures when acting on the proposed federal standards, the majority opinion concluded that these specific procedural requirements ". . . do not purport to set standards to be followed in all areas of the state commission's endeavors." *Id.*, 456 U.S. at 771.

Section 121(a) of PURPA does not require an evidentiary hearing. Moreover, it does not require a hearing. It merely provides that any electric consumer has a generic right to intervene and participate. The decision of the Washington Supreme Court is therefore likewise consistent with this Court's earlier holdings that even a statutory requirement to conduct a "hearing", without being more specific, does not require a full range of judicial procedures. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) and *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973).

Seattle did not eliminate participation. It provided a legislative mode of participation. In its 1977 term, this Court upheld similar legislative, rather than judicial, procedures for "participation" in federal rulemaking under Section 4 of Administrative Procedure Act (5 U.S.C. § 553). *Vermont Yankee Nuclear Power Corp. v. NRDC, supra.* In so ruling, the Court noted that it has repeatedly cautioned reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress. *Id.*, 435 U.S. at 525.

2. No Constitutional Question is Raised By the Washington Supreme Court Decision

In contrast to the Federal District Court decision that gave rise to this Court's consideration of PURPA in *FERC v. Mississippi*, the Washington Supreme Court did not question the constitutional validity of Section 121(a) of PURPA. The decision specifically declared that "the right of intervention and participation exists in *any* proceeding" (Pet. App. p. 17a, emphasis by the court).

The Washington Supreme Court did not rule that the generic right to intervene and participate requires that every rate making proceeding of a nonregulated utility be thereby transformed into an adjudicatory proceeding with a full panoply of judicial safeguards (Pet. App. p. 18a). It is only if petitioners' exaggerated view of Section 121(a) were to be endorsed that this Court would be confronted with reopening the inquiry into the constitutional validity of PURPA just concluded in *FERC v. Mississippi*.

3. There Is No Conflict Among the State Courts or Among the Circuits

As far as respondent is aware, *Earle M. Jorgensen Co. v. Seattle*, is the only case so far decided by a State Court of last resort or by a Federal Circuit Court that has specifically ruled on the generic right to intervene and participate provided in Section 121(a) of PURPA. Thus, there is no conflict among either State Courts or Federal Circuits Courts that this Court may resolve.

The Washington Supreme Court decision, moreover, is consistent with the interpretation of Section 121(a) expressed by the one United States District Court that appears to have touched on the issue. *City of Pittsburgh v. Pennsylvania P.U.C.*, 512 F. Supp. 1117 (W.D. Pa. 1981). In that case, the District Court rejected Pittsburgh's claim for production of transcripts based on its failure to meet the jurisdictional requirement under 16 U.S.C. § 2633 that a State Court must first have denied plaintiff's right to intervene and participate.

In the course of dismissing the plaintiff's claims, the Court noted the lack of specific procedural requirements in Section 121(a):

> There is, furthermore, no support for Plaintiffs' assertion that receiving "timely transcripts" is recognized as part of the "rights of participation" under PURPA, since rights of participation are contained in one section, § 2631, and another section, § 2632(c), deals with transcripts. It is clear that had Congress intended that any rights to receive transcripts be part of rights of participation, they would appear in the same section.

Id., 512 F. Supp. at 1120.

This interpretation by a Federal District Court stands in harmony with the Washington Supreme Court's determination that Section 121(a) does not dictate any particular procedures by merely providing any electric consumer with the right to intervene and participate.

4. The Washington Supreme Court Decision Preserves the Long Recognized Distinction Between Privately and Publically Owned Utilities

The decision of the Washington Supreme Court affirmed that under State law in Washington, municipal electric utilities are not regulated by the Washington Utilities and Transportation Commission and that the municipality owning the utility has "full authority" to set rates through legislative action. (Pet. App. pp. 11a-13a.)

This Court itself has long recognized and upheld the distinction between private utilities regulated by State utility commissions and public utilities having the authority to set rates by legislation. *Springfield Gas & Elec. Co. v. Springfield*, 257 U.S. 66 (1921). Writing for the Court in *Springfield*, Justice Holmes sustained the public policy behind the distinction:

> The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the

> equal protection of the laws. But we agree with the supreme court of the state that the difference between the two types of corporation warrants the different treatment that they received.
>
> The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must.

Id., 257 U.S. at 69-70.

In response to a recent challenge to rate setting by a public utility district, the Washington Supreme Court likewise outlined the rationale for providing publically owned utilities the authority to conduct independent rate making proceedings. *Snohomish Cty. PUD 1 v. Broadview Television*, 91 Wn.2d 3, 586 P.2d 851 (1978). Justice Rosellini (the author of the dissent in the *Jorgensen* case below), on behalf of a unanimous Washington Supreme Court, reasoned as follows:

> We should observe in passing that we do not think the legislature, in exempting public utility districts from the control of the Utilities and Transportation Commission and giving them plenary authority to set rates and charges, was manifesting a disregard for the interests and rights of customers such utilities. Rather, it would appear that it had in mind the nature of such utilities, which are formed by the voters of the district and whose commissioners are likewise elected. RCW 54.08. The facts that the district is publicly owned and operated and that it has no profit motive offer reasonable assurance that excessive charges for utility services will not be imposed.

Id., 91 Wn.2d at 8-9 (footnote omitted).

PURPA itself recognizes that there are electric utilities throughout the United States whose rates are not regulated by a State regulatory authority. Section 3(9) of PURPA (16 U.S.C. § 2602(9)) defines the term "nonregulated

electric utility" to mean "any electric utility other than a State regulated electric utility."

It would be quite extraordinary then to conclude that, by providing a generic right to intervene and participate in rate making proceedings of a nonregulated utility, Congress meant to mandate a wholesale transformation in the procedures traditionally employed by nonregulated utilities. Even the dissent in the case below did not conclude that the right of intervention and participation required any particular judicial procedures. The dissent agreed with the majority that State law should determine the right of intervention but argued that the particular State law that should be applied here was Seattle's administrative code. (Pet. App. p. 22a.) Even if this last leap in reasoning could be accepted, the majority pointed out that Seattle's administrative code could have limited public participation to written presentations (Pet. App. p. 19a).

Petitioners go farther than the dissent below and urge this Court to consider the argument that their right to participate in Seattle's rate making proceedings was "eliminated" because they were not guaranteed a judicial rather than a legislative proceeding (Pet. pp. 5-6). Petitioners urge this Court to consider whether Section 121(a) of PURPA specifically requires:

> [A] city council, acting as the rate-making authority for a nonregulated electric utility, to give ratepayers notice of rate proposals when requested; to permit ratepayers to appear, to speak, and to provide expert testimony during consideration of rate proposals; and to permit ratepayers to cross-examine witnesses proposing specific rates, priniciples of rate allocation, or specific rate designs during a rate proceeding in order to contribute toward achieving the purposes of PURPA?

(Pet. (i)).

Yet, the procedural requirements that petitioners urge this Court to consider reading into Section 121(a) of PURPA are equivalent to what is defined in PURPA as an "evidentiary hearing":

> (6) The term "evidentiary hearing" means—
>
> (A) in the case of a State agency, a proceeding which (i) is open to the public, (ii) includes notice to participants and an opportunity for such participants to present direct and rebuttal evidence and to cross-examine witnesses, (iii) includes a written decision, based upon evidence appearing in a written record of the proceeding, and (iv) is subject to judicial review; [PURPA § 3(6)(A), 16 USC § 2602(6)(A)]

PURPA, however, requires that an "evidentiary hearing" be held in only two instances: (1) when considering life line rates under Section 114 (16 U.S.C. § 2624(b)) and (2) when an automatic adjustment clause is adopted and the special rules of Section 115 (16 U.S.C. § 2625(e)(1)(A)) take effect. In contrast, even the prescribed procedures for considering the mandatory federal standards under Sections 111 and 113 (16 U.S.C. §§ 2621 and 2623) require only a "hearing", not an "evidentiary hearing".

Given the specific definition of "evidentiary hearing" in PURPA and the limited circumstances under which an evidentiary hearing must be conducted, it is highly improbable that Congress meant to dictate the use of equivalent, judicial procedures by nonregulated electric utilities in every ratemaking proceeding simply by affirming every customer's "right to intervene and participate".

5. The Washington Supreme Court Did Not Eliminate Ratepayer Participation Nor Did It Eliminate Petitioners' Ability to Seek Procedural Change Through Legislation

Petitioners' right to intervene and participate in ratemaking proceedings was affirmed in the decision below. (Pet. App. p. 17a.) Petitioners did participate in ratemaking proceedings conducted by Seattle leading to the enactment of the challenged ordinance. (Pet. App. pp. 8a-9a.) These proceedings

encompassed a typical legislative process, supplemented by a specially created Citizens' Rate Advisory Committee.

Seattle also conducted the evidentiary hearing required in the consideration of life line rates under Section 114 of PURPA and the hearings required in the mandatory consideration of federal standards under Sections 111 and 113 of PURPA. (Pet. App. p. 18a.) Despite their professed interest in PURPA, and despite the fact that these proceedings dealt directly with PURPA standards, none of the petitioners participated in any of these proceedings. (Pet. App. p. 18a.)

It is indeed odd, therefore, that petitioners should support their petition by arguing that the problems of ratepayers served by nonregulated utilities in the Pacific Northwest "should not be 'exacerbated by the rate structures employed by most utilities'" (Pet. p. 7, quoting from *FERC v. Mississippi*, *supra*, 456 U.S. at 756. The "exacerbating rate structures" cited by this Court in *FERC v. Mississippi*, referred to the prevalence of declining block rates noted in S. Rep. No. 95-442 at 26, *reprinted in* U.S. Code Cong. & Ad. News 7903, 7923. *Id.* 456 U.S. at 756. The problem of declining block rates, however, was precisely the issue that PURPA addressed in the mandatory "declining block rates" standard required to be considered by every nonregulated electric utility, as well as every State regulatory authority, under Section 111(d)(2) of PURPA (16 U.S.C. § 2621(d)(2)). While its label may be misleading, the "declining block rates" standard actually calls for the *elimination* of unjustified declining block rates. It was the declining block rates standard, among other Section 111 standards, that Seattle considered in hearings on April 29 and May 5, 1980. (Pet. App. p. 18a.) In fact, Seattle not only considered but adopted the declining block rates standard. Seattle Ordinance 109160, enacted June 30, 1980. It was this same set of hearings on the declining block rates standard that formed one of the mandated PURPA proceedings in which petitioners did not even bother to participate.

If petitioners are dissatisfied with the *mode* of participation provided by Seattle and other nonregulated electric utilities, they have recourse to a number of legislative sources for relief. They can request Seattle and all other nonregulated utilities to adopt judicial procedures on their own. They can request the Washington Legislature to put Seattle and all other publically owned utilities in Washington under the regulatory control of the State Utilities and Transportation Commission. In the alternative, they can request the Legislature to require that Seattle and all other publically owned utilities adopt specific judicial procedures in ratemaking proceedings. They can petition Congress to amend PURPA and require nonregulated electric utilities to conduct evidentiary hearings in all ratemaking proceedings. They can even petition Congress to totally preempt the field of electric rate regulation and to further require that Federal electric rate setting go beyond the Administrative Procedure Act to provide a full panoply of judicial safeguards. They cannot, however, claim that Seattle denied them a legislative mode of participation.

CONCLUSION

Congress set out specific procedural requirements for considering the suggested federal standards in Sections 111, 113 and 114 of PURPA. Congress did not specify any particular procedures when it provided a generic "right to intervene and participate" within Section 121(a) of PURPA. The principle expressed by this Court in *Vermont Yankee Nuclear Power Corp. v. NRDC, supra*, 435 U.S. at 524 therefore applies:

> Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

This petition does not present such a rare circumstance. The electric rates ultimately enacted in Ordinance 109218 at the conclusion of Seattle's legislative ratemaking process were held by the trial court below not to be unfair, unjust, or unreasonable. (Pet. App. p. 9a.) The trial court further held that the City did not act arbitrarily or capriciously in enacting the rate ordinance and that the methodology employed by the City in establishing the rate increase was not fundamentally erroneous. (Pet. App. pp. 9a-10a.) The petitioners did not appeal.

The petition for writ of certiorari should be denied.

Respectfully submitted this 18th day of October, 1983.

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